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LEXSEE 2009 U.S. APP. LEXIS 8464

Centauri Shipping Ltd., Plaintiff-Appellant, -v.- Western Bulk Carriers KS, Western Bulk AS, Western Bulk Carriers AS, Defendants-Appellees.

07-4193-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

323 Fed. Appx. 36; 2009 U.S. App. LEXIS 8464

April 20, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: *Centauri Shipping Ltd. v. Western Bulk Carriers KS, 528 F. Supp. 2d 197, 2007 U.S. Dist. LEXIS 83134 (S.D.N.Y., 2007)*

COUNSEL: [*1] For Appellant: Kirk M. Lyons (Jon Werner, on the brief), Lyons & Flood LLP, New York, NY.

For Appellee: Patrick F. Lennon, Lennon, Murphy & Lennon, LLC, New York, NY.

JUDGES: PRESENT: HON. CHESTER J. STRAUB, HON. SONIA SOTOMAYOR, HON. DEBRA ANN LIVINGSTON, Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant Centauri Shipping Ltd. appeals from the September 12, 2007 judgment of the United States District Court for the Southern District of New York (Sullivan, J.) vacating the attachment of appellee Western Bulk Carriers KS's property. We assume the parties' familiarity with the underlying facts and procedural history of the case.

The only issue presented by this appeal is whether Western Bulk Carrier KS's registration to conduct business in New York pursuant to *New York Business Corporation Law § 1304* is sufficient for that corporation to be "found within the district" under *Rule B(1) of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions, thereby defeating attachment of the corporation's property. This Court recently decided the issue in the affirmative. [*2] *See STX Panocean*

(UK) Co. v. Glory Wealth Shipping PTE Ltd., 560 F.3d 127, 133 (2d Cir. 2009) (per curiam).

When ordered to submit additional briefing on the question of whether and how *STX* affected its appeal, Centauri failed to distinguish its case from *STX*, and instead urged us to reconsider the holding of *STX*. We are bound by *STX* unless and until its rationale is overruled by the Supreme Court or by this court *en banc*. *See State Employees Bargaining Agent Coal. v. Rowland, 494 F.3d 71, 86 (2d Cir. 2007)*.

We have reviewed appellant's remaining arguments and find them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.

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LEXSEE 560 F.3D 127

STX PANOCEAN (UK) CO., LTD., Plaintiff-Appellant, - v.- GLORY WEALTH SHIPPING PTE LTD. AND GLORY WEALTH SHIPPING SERVICES LTD. OF BVI, Defendants-Appellees.

Docket No. 08-6131-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

560 F.3d 127; 2009 U.S. App. LEXIS 5751; 2009 AMC 748

February 13, 2009, Argued
March 19, 2009, Decided

SUBSEQUENT HISTORY: As Amended March 27, 2009.

PRIOR HISTORY: [1]**

Motion seeking a stay pursuant to *Federal Rule of Appellate Procedure 8(a)*, and appeal of the December 10, 2008 order of the United States District Court for the Southern District of New York (Daniels, J.),

vacating the ex parte Process of Maritime Attachment and Garnishment obtained by Plaintiff-Appellant.

DISPOSITION: THE MOTION IS DISMISSED AS MOOT AND THE DISTRICT COURT ORDER IS AFFIRMED.

COUNSEL: CHRISTOPHER CARLSEN, Clyde and Co. U.S. LLP, New York, NY, for Plaintiff-Appellant.

JAMES H. POWER, (Lisa D. Schaupp on the brief), Holland & Knight, LLP, New York, NY, for Defendants-Appellees.

JUDGES: Before: WALKER, CALABRESI, and WESLEY, Circuit Judges.

OPINION

[*128] PER CURIAM:

Plaintiff-Appellant STX Panocean (UK) Co., Ltd. ("STX") appeals from and seeks a stay, pursuant to *Federal Rule of Appellate Procedure 8(a)*, of the December 10, 2008 order of the United States District Court for the Southern District of New York (Daniels, J.) vacating the *ex parte* Process of Maritime Attachment and Garnishment obtained by STX in the amount of $ 900,000 against Glory Wealth Shipping Pte Ltd. ("Glory Wealth") and Glory Wealth Shipping Service Ltd. ("Glory Service") (collectively, the "Defendants"). We find that registration with the New York Department **[**2]** of State, pursuant to *New York Business Corporation*

Law § 1304, to conduct business in New York, and designation of an agent within the district upon whom process may be served constitutes being "found" within the district for purposes of *Rule B of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions. We therefore affirm the district court's vacatur of the maritime attachment and dismiss the motion for a stay as moot.

BACKGROUND

In November 2008, STX filed a complaint against Defendants, alleging that **[*129]** Glory Wealth agreed to charter one of its vessels, but then failed to produce the required hire payment for a fifteen-day period, and that Glory Service served as guarantor of Glory Wealth's performance. The district court issued an *ex parte* order pursuant to *Rule B of the Supplemental Rules for Admiralty of Maritime Claims and Asset Forfeiture Actions* granting an attachment against Glory Wealth in the amount of $ 900,000. *See STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, No. 08-CV-9762 (GBD) (S.D.N.Y. Nov. 13, 2008) (*Ex Parte* Order).

The Defendants responded with a letter motion to vacate the attachment. The Defendants argued that they were not subject to a Rule **[**3]** B attachment because they had registered with the New York Department of State and therefore could be "found" in New York for Rule B purposes.

On December 10, 2008, the district court conducted a hearing to assess whether Glory Wealth in fact met Rule B's requirements. At the conclusion of the hearing, the district court vacated the

attachment, finding that "[i]n the absence of a clear statement by the Second Circuit to the contrary," the court agreed with the sizable majority of Southern District judges who concluded "that the requirements [for a finding that the defendant is] found in this district are not a set of greater requirements than [those required to exercise] personal jurisdiction over the defendant[s] in this case." *Id.* (Hr'g Tr.) 27. The district court also noted that if STX won an arbitration award, it could return to the Southern District to satisfy that judgment against the Defendants. *Id.* at 28. STX reiterated its request for a stay of the vacatur pending the outcome of the appeal before this Court of *Centauri Shipping Ltd. v. W. Bulk Carriers KS, 528 F. Supp. 2d 186 (S.D.N.Y. 2007), appeal docketed*, No. 07-4193-cv (2d Cir. Sept. 18, 2007). The district court denied **[**4]** the application. *Id.* at 29-30. The district court explained that "the balance of hardships doesn't weigh towards a stay" where the attachment affected a significant amount of funds that were intended to flow to other parties. *STX Panocean*, No. 08-CV-9762 (Hr'g Tr.) 29-30. The district court added that "there's no reason to believe that, if appropriate, future funds can't be attached in further support of an arbitration award," particularly where it was unclear whether STX had even filed for arbitration. *Id.* at 30. On December 16, 2008, STX filed a timely notice of appeal.

On December 18, 2008, STX filed a motion for a stay of execution of the order vacating the attachment. The applications judge granted a temporary stay pending this Court's hearing of that motion.

Because this is an issue of frequent occurrence in this circuit, *see, e.g., Marimed Shipping, Inc. v. Persian Gulf Shipping Co., 567 F. Supp. 2d 524 (S.D.N.Y. 2008); Pioneer Navigation Ltd. v. Stx Pan Ocean (U.K.) Co., 08 Civ. 10490 (JGK), 2008 U.S. Dist. LEXIS 103255; Minmetals Shipping & Forwarding Co. v. HBC Hamburg Bulk Carriers GmbH & Co., No. 08 Civ. 3533 (RWS), 2008 U.S. Dist. LEXIS 48639 (S.D.N.Y. Jun. 24, 2008); Carolina Shipping, Ltd. v. Renaissance Ins. Group, No. 08 Civ 4711 (BSJ), 2008 U.S. Dist. LEXIS 104432 (S.D.N.Y. Jun. 10, 2008),* **[**5]** *appeal docketed,* No. 08-3142-cv (2d Cir. Jun. 24, 2008); *Centauri, 528 F. Supp. 2d at 186,* and disposition of the motion requires analysis of the merits of the underlying appeal, we consolidated the motion and underlying appeal to resolve the merits of plaintiff's claim for an attachment. The parties were instructed to brief the substance of the appeal as well as the motion.

[*130] DISCUSSION

This Court, in its discretion, may issue a stay pending appeal under Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A factor to be considered in granting a stay is whether the movant has demonstrated "a strong showing that he is likely to succeed on the merits." *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2d Cir. 2007).* In our view, STX cannot demonstrate any likelihood of success on the merits.

Rule B provides, in relevant part: "If a defendant is not found within the district . . . a verified

complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount [**6] sued for--in the hands of garnishees named in the process." *Fed. R. Civ. P. Supp. R. B(1)(a).* STX argues that Defendant's registration pursuant to *§ 1304* alone is insufficient to avoid attachment in the Southern District of New York. However, for the following reasons, we find that registration under the statute is sufficient--defendants who have registered with the Department of State pursuant to *§ 1304* may be "found" within the district for purposes of Rule B analysis. [1]

> 1 We note that there has been some disagreement among district court judges as to the meaning of the term "district." However, this issue is not before us as the parties both agree that the district in question in this case is the Southern District of New York.

Maritime attachments arose because it is often more difficult to obtain jurisdiction over parties to a maritime dispute than parties to a traditional civil action. Maritime parties are itinerant, their assets transitory. *See In re Louisville Underwriters, 134 U.S. 488, 493, 10 S. Ct. 587, 33 L. Ed. 991 (1890).* Thus, the traditional policy underlying maritime attachment has been to permit the attachment of assets wherever they can be found, thereby obviating the need for a plaintiff to "scour [**7] the globe" to find a proper forum for suit, or property of the defendant sufficient to satisfy a judgment. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 443 (2d Cir. 2006).*

As such, an attachment under *Admiralty Rule B* serves two purposes. The attachment establishes jurisdiction over a portion of a defendant's property and thereby creates a fund from which a judgment may be satisfied. *See Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 581-82 (2d Cir. 1963)*. However, this Court has stated that "[t]he two purposes may not be separated . . . for security cannot be obtained except as an adjunct to obtaining jurisdiction." *Id. at 582*. Thus, Rule B gives potential defendants the choice between subjecting themselves to the jurisdiction of the courts of the district in question, or making themselves vulnerable to the possibility that their property in the district will be attached. *See Daehan Shipping Co., Ltd. v. Farenco Shipping Co., Ltd., No. 08 Civ. 10052, 2008 U.S. Dist. LEXIS 104433, 2008 WL 5068962, at *1 (S.D.N.Y. Nov. 24, 2008)*.

Although *Rule B* does not expressly define "found within the district," this Court has interpreted it to require "a two-pronged inquiry: first, whether [Defendants] **[**8]** can be found within the district in terms of jurisdiction, and second, if so, whether [they] can be found for service of process." (the "*Seawind* Test"). *Seawind, 320 F.2d at 582* (internal citations and quotation marks omitted); *see also Integrated Container Serv. Inc. v. Starlines Container Shipping Ltd., 476 F. Supp. 119, 122 (S.D.N.Y. 1979)* (stating that "[a] maritime **[*131]** attachment is precluded under [Rule B] only if the defendants have engaged in sufficient activity in the district or the cause of action has sufficient contacts with the district to permit the court to exercise in personam jurisdiction over the defendants," and the defendant "can be found within the geographical confines of the

district for service of process."). While the purpose of the prongs cannot be separated, they are distinct: the presence of an agent authorized to accept process is, alone, insufficient to establish that a defendant is "found" within that district. *See Seawind, 320 F.2d at 583*. Similarly, sufficient contacts to establish in personam jurisdiction in the *International Shoe* sense, absent a showing of actual presence that would allow a plaintiff to locate the defendant in the district for service **[**9]** of process, will not support a conclusion that a defendant is found within that district. *Id. at 583-84*; *see also Integrated Container, 476 F. Supp. at 122*.

Federal law defines the requirements necessary for satisfaction of *Rule B*; however, federal courts look to the relevant state law to determine if those requirements are met. Therefore, we look to New York law to determine whether the Defendants can be found within the Southern District. *See, e.g., Seawind, 320 F.2d at 583* (looking to state law governing service of process and personal jurisdiction to analyze whether the defendant was found within the Southern District).

It is undisputed that Defendants in this case satisfy the second prong of the *Seawind* Test, as both parties agree that Defendants have designated an in-state agent to receive service of process in the district at issue. *See STX Panocean*, No. 08 CV 9762, (Hr'g Tr.) 7. Therefore, we need only address the first prong of the test: whether Defendants are subject to personal jurisdiction in the district.

It is well-settled under New York law that registration under *§ 1304* subjects foreign companies to personal jurisdiction in New York. *See, e.g.,*

Augsbury Corp. v. Petrokey Corp., 97 A.D.2d 173, 470 N.Y.S.2d 787 (3d Dep't 1983); [**10] *Robfogel Mill-Andrews Corp. v. Cupples Co., Mfrs., 67 Misc. 2d 623, 624, 323 N.Y.S.2d 381 (N.Y. Sup. Ct., Monroe Cty. 1971)*. Federal courts have applied this doctrine as well. *See, e.g., Iyalla v. TRT Holdings, Inc., No. 04 Civ. 8114 (NRB), 2005 U.S. Dist. LEXIS 14913, 2005 WL 1765707, at *3 (S.D.N.Y. Jul. 25, 2005)*; *Cannon v. Newmar Corp., 210 F. Supp. 2d 461, 463 n.2 (S.D.N.Y. 2002)*; *see also Rockefeller Univ. v. Ligand Pharms., 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008)* (holding that authorization to do business in New York and designation of a registered agent for service of process "amount to consent to personal jurisdiction in New York.").

Only one Southern District of New York case, *Erne Shipping Inc. v. HBC Hamburg Bulk Carriers, GmbH & Co. KG, 409 F. Supp. 2d 427 (S.D.N.Y. 2006), overruled in part by Aqua Stoli, 460 F.3d at 446*, has found a foreign corporation's "mere filing for authorization to do business" in New York to be insufficient under Rule B, which the district court interpreted as requiring more "systematic and continuous" contacts. In contrast, every subsequent Southern District court to have considered the issue has held that registration with the Department of State pursuant to *New York Business Corporation Law § 1304*, [**11] constitutes being "found" within the district for purposes of *Rule B. See Marimed Shipping, 567 F. Supp. 2d at 528* (citing cases). *Erne* has been widely discussed, criticized, and rejected by the judges in the Southern District. *See, e.g., id.; Centauri Shipping, 528 F. Supp. 2d at 191-92.*

Under this majority view, amenability to suit, rather than a party's economic **[*132]** and physical activities in the district at issue, is the touchstone of the first prong of the *Seawind* Test. *See Integrated Container, 476 F. Supp. at 123*; *Centauri Shipping, 528 F. Supp. 2d at 191*. Recently, in *Aqua Stoli*, this Court declined to specifically discuss the "found" factor of the *Rule B* test, stating that district courts have not "experienced any confusion in its application," and citing *Integrated Container, 476 F. Supp. at 123*, in support of this contention. *460 F.3d at 445 n.4*. In *Integrated Container*, Judge Pierre N. Leval, then sitting on the district court, held that the jurisdictional presence factor is satisfied either where the defendant's "activity in the district" or its "contacts within the district . . . permit the court to exercise *in personam* jurisdiction over the defendant." *Id. at 122*. Applying **[**12]** this standard, the court in *Integrated Container* found that the defendant's registration as a foreign corporation with the New York Department of State, as well as its contractual consent to suit in New York, were sufficient to establish the defendant's presence within the district for purposes of *Rule B*. *Id*.

Moreover, the district courts' reasoning that registration with the State satisfies the jurisdictional prong of the test for being "found" is persuasive in light of the underlying purpose of maritime attachment. In the context of peripatetic defendants with transient assets, maritime attachment is aimed at obviating a plaintiff's need to determine where the defendant is amenable to suit. *See In re Louisville Underwriters, 134 U.S. at 493*. However, no "scour[ing of] the globe"--and, therefore, no

attachment--is necessary where the defendant has already voluntarily subjected itself to the district's jurisdiction by reason of its registration with the State. *See Amoco Overseas Oil, 605 F.2d at 655.*

"Maritime attachment is centuries old." *Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 267 (2d Cir. 2003)*; *accord Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44, 47 (2d Cir. 1996)* **[**13]** ("[M]aritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844."); *see also Atkins v. Fibre Disintegrating Co., 85 U.S. (18 Wall.) 272, 303, 21 L. Ed. 841 (1873).* It has long existed because of the highly international nature of maritime commerce and the transitory nature of maritime assets within a given jurisdiction. *See Aqua Stoli, 460 F.3d at 443*; *Aurora Maritime Co., 85 F.3d at 48*; *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979).* But as the world changed, so too did the exact nature and necessity of maritime attachment. In 1966, when *Supplemental Rule B* was created, the Advisory Committee drew heavily upon Admiralty Rule 2. *See Supp. R. B*, Advisory Committee's Notes. By 1966, however, it was clear that the precise need for maritime attachment and nature of maritime commerce had changed a great deal over the previous several hundred years and was likely to continue to change. For that reason, neither *Supplemental Rule B* nor the Advisory Committee attempted to define **[**14]** what it means to be "found within the district." *See id.* Rather, the Advisory Committee stated that "[t]he

subject seems one best left for the time being to development on a case-by-case basis." *Id.* This, we believe, invited courts to define what it means to be "found" in a common law fashion. But common law development in time can yield firm rules. And that is precisely what we hold today.

[*133] In the modern era, although maritime commerce is still international and maritime assets are still transitory, companies that have both appointed an agent for service of process and registered in New York, consenting to jurisdiction, do not pose the same needs for maritime attachment. Indeed, in today's era of electronic banking, many of the assets that are attached in New York are not ships, but rather electronic wire transfers routed through banks. And in today's era, "[t]he frustrated creditor" is not "much like Evangeline, the poor Arcadian girl separated from her lover, . . . tragically left to roam the shores awaiting the debtor's next arrival." *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 732 F.2d 1543, 1548 (11th Cir. 1984)* (referencing Henry Wadsworth Longfellow, **[**15]** Evangeline, *A Tale of Acadie* (1843)). Rather, when that debtor is registered to do business in New York, there are generally any number of means to prosecute a civil claim and, upon receiving judgment, collect on that claim.

Thus, we hold that a defendant's registration under *New York Business Corporation Law § 1304* is sufficient to satisfy both prongs of the *Seawind* Test and, therefore, a company registered with the Department of State is "found" for purposes of *Rule B of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Applying this rule to the case at hand, we find that STX is present in the district both jurisdictionally, by virtue of its registration with the Department of State, and in terms of its ability to accept service of process, by virtue of its appointment of a designated agent for service of process within the district. Both of these are accomplished through its registration with the Department of State pursuant to *§ 1304*. [2]

> 2 STX itself conceded that Defendants' registration with the State subjects them to personal jurisdiction. When asked "Is there any way they can argue they can't be sued and a judgment enforced against them in this **[**16]** jurisdiction," by Judge Daniels, counsel for STX answered, "I don't believe so . . ." Previously, counsel for STX had stated that "[Defendants are] subject to personal jurisdiction by virtue of their registration."

Because STX is not entitled to maintain its attachment by virtue of the Defendants' being "found" within the district, it cannot demonstrate a likelihood of success on the merits for purposes of its motion, and, necessarily, it also loses the underlying appeal. We thus affirm the district court's vacatur of the maritime attachment and dismiss the motion as moot.

CONCLUSION

For the foregoing reasons, the district court's order of December 10, 2008 vacating the *ex parte* Process of Maritime Attachment and Garnishment is hereby AFFIRMED. The motion for a stay of that

order pursuant to *Federal Rule of Appellate Procedure 8(a)* is DISMISSED AS MOOT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTAURI SHIPPING, LTD., Plaintiff, -v- WESTERN BULK CARRIERS KS, WESTERN BULK CARRIERS AS, and WESTERN BULK AS, Defendant.	Case No. 07 Civ. 4761 (RJS) ORDER

RICHARD J. SULLIVAN, District Judge:

The Court having conducted a post-attachment hearing pursuant to Supplemental Admiralty Rule E(4)(f) on September 5, 2007 and having ruled on the record in open court on September 7, 2007 that the Court's June 5, 2007 Ex Parte Order for Process of Maritime Attachment and Garnishment and June 15, 2007 Order providing for the substitution of attached funds with a surety bond be vacated on the basis that the technical requirements for issuance of the June 5, 2007 Ex parte Order pursuant to Supplemental Admiralty Rule B(1)(a) were not met because the Defendant, Western Bulk Carriers K/S was, in fact, present in the District on June 5, 2007 for purposes of Supplemental Admiralty Rule b, both jurisdictionally, by virtue of its June 22, 2005 registration with the New York Secretary of State, Department of Corporations to conduct business in

the State of New York, and readily in terms of its amenability to accept service of process by virtue of its June 22, 2005 appointment of a designated agent for service of process within the District,

IT IS ORDERED that the Court's June 5, 2007 Ex Parte Order for Process of Maritime Attachment and Garnishment and June 15, 2007 Order providing for the substitution of attached funds with a surety bond be and hereby are vacated;

IT IS FURTHER ORDERED that after the expiration of 10 days from the date this Order is entered on the Court's docket the Plaintiff shall return to the Defendant, Western Bulk Carriers K/S, the surety bond it posted on June 15, 2007;

IT IS FURTHER ORDERED that the Plaintiff shall advise the Court by September 17, 2007 if it intends to file an Amended Complaint setting forth a proper jurisdictional basis for its claims in this Court.

Dated: September 12, 2007
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

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LEXSEE 528 F. SUPP. 2D 186

CENTAURI SHIPPING LTD., Plaintiff, VERSUS WESTERN BULK CARRIERS KS, WESTERN BULK CARRIERS, AS, AND WESTERN BULK, AS, Defendants.

No 07-CV-4761 (RJS) (HBP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

528 F. Supp. 2d 186; 2007 U.S. Dist. LEXIS 77953; 2008 AMC 43

October 12, 2007, Decided
October 12, 2007, Filed

SUBSEQUENT HISTORY: Sanctions disallowed by, Request denied by *Centauri Shipping Ltd. v. Western Bulk Carriers KS, 528 F. Supp. 2d 197, 2007 U.S. Dist. LEXIS 83134 (S.D.N.Y., Nov. 5, 2007)*

COUNSEL: [**1] Plaintiff is represented by Kirk M.H. Lyons, Esq., Lyons & Flood, L.L.P., New York, New York.

Defendants are represented by Kevin John Lennon, Esq., and Patrick F. Lennon, Esq., Lennon, Murphy & Lennon, LLC, New York, New York.

JUDGES: RICHARD J. SULLIVAN, United States District Judge.

OPINION BY: RICHARD J. SULLIVAN

OPINION

[*187] MEMORANDUM AND ORDER

October 12, 2007

RICHARD J. SULLIVAN, District Judge:

Plaintiff Centauri Shipping Ltd. ("Centauri") commenced the above-entitled action on June 5, 2007, seeking, *inter alia,* a writ of attachment pursuant to Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims. On that date, the Honorable Kenneth M. Karas, District Judge, signed an order permitting plaintiff to attach assets of defendants Western Bulk Carriers KS ("defendant" or "WBC KS"), Western Bulk Carriers AS ("WBC AS"), and Western Bulk AS (collectively, the "WBC Group"), in the amount of $ 15,350,796.00 (hereinafter, "the attachment order"). (*See* Order dated June 5, 2007.) Subsequently, by order dated September 7, 2007, the Court vacated the attachment order (hereinafter, "the *vacatur*").

Plaintiff now moves, pursuant to *Rule 62 of the Federal Rules of Civil Procedure*, [**2] to stay the *vacatur* during the pendency of the appeal of that order or, in the alternative, to stay the *vacatur* temporarily so that plaintiff may apply for a stay to the Second Circuit Court of Appeals. For the following reasons, the Court denies plaintiff's motion for a stay pending appeal, and orders a temporary stay pending resolution of plaintiff's application to the Court of Appeals.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the facts and procedural history of this action. Below, the Court briefly recites the facts necessary to resolve the instant motion: [1]

> 1 The facts recited herein are undisputed, unless otherwise noted.

On June 5, 2007, Centauri commenced this action by filing a complaint and a proposed *ex parte* order of attachment against WBC KS and two distinct corporate entities that co-own WBC KS. (Compl. P 3; Vangsnes Decl. P 10.) In support of the proposed attachment order, Centauri's counsel submitted an affirmation (the "June 5 affirmation") stating, *inter alia*, that:

> Your affiant [plaintiff's counsel] has attempted to locate the defendants . . . within this District. As part of the investigation, my office has contacted the Division [**3] of Corporations of the New York Department of State and found no

> records indicating that defendants were either incorporated or licensed to do business in the State of New York. . . . I declare and state under the penalty of perjury that the foregoing is true and correct.

(Lyons Aff. dated June 5, 2007, P 2.)

On June 5, 2007, Judge Karas signed the *ex parte* attachment order. Thereafter, Centauri proceeded to attach assets of WBC KS found within the Southern District of New York (the "District") in the amount of $ 15,350,796.00. (Lyons Aff. dated Sept. 17, 2007 (hereinafter, "Lyons Aff."), P 2.) On June 15, 2007, upon WBC KS' motion, Judge Karas signed an order dissolving the attachment and directing WBC KS to post a bond in the amount equal to the attached assets (the "surety bond"). (Order dated June 15, 2007.)

Subsequently, on August 10, 2007, WBC KS moved to vacate the attachment order pursuant to *Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims* ("Rule E"). In its moving papers, WBC KS asserted that the above-quoted portion of the June 5 affirmation of plaintiff's **[*188]** counsel was demonstrably false, and that, in fact, WBC KS had been licensed as a foreign corporation **[**4]** in New York State since 2005 and was so licensed at the time that plaintiff sought and obtained the attachment order. (Lennon Decl. P 5.)

By letter dated August 16, 2007, plaintiff's counsel represented to the Court that, at the time he submitted the proposed attachment order and the

June 5 affirmation, he had "knowledge that defendant [WBC KS] was registered" with the State as a foreign corporation. (Pl.'s Aug. 16, 2007 Ltr., at 2.) However, according to plaintiff's counsel, the false statements regarding WBC KS' registration were included in the June 5 affirmation due to a purported "clerical error" by plaintiff's counsel. [2] (*Id.*)

> 2 On September 12, 2007, the Court directed plaintiff's counsel to show cause as to why the Court should not impose sanctions on counsel pursuant to *Rule 11(b) of the Federal Rules of Civil Procedure*, in light of counsel's submission of a demonstrably false affidavit. The issue of whether to impose sanctions on plaintiff's counsel is now pending before the Court.

On September 5, 2007, the undersigned heard oral argument regarding the motion to vacate. [3] (*See* Tr. of Proceedings on Sept. 5, 2007.) By oral decision on September 7, 2007, the Court granted WBC [**5] KS' motion to vacate the attachment and stated the reasons therefor on the record (the "*vacatur decision*"). (*See* Tr. of Proceedings on Sept. 7, 2007 (hereinafter, "Tr. of the *Vacatur* Decision").) On September 12, 2007, the Court issued the *vacatur*, lifting the attachment and directing plaintiff to return the surety bond to WBC KS after the expiration of ten days from the date of the *vacatur*.

> 3 This action was reassigned to the undersigned on September 4, 2007.

On September 17, 2007, plaintiff filed a notice of appeal of the *vacatur* with the Court of Appeals for the Second Circuit. Also on September 17, 2007,

plaintiff filed a motion with this Court to stay the *vacatur* pending appeal. On September 28, 2007, the Court heard oral argument regarding plaintiff's motion to stay. (*See* Tr. of Proceedings on Sept. 28, 2007.)

II. STANDARD OF REVIEW

As a threshold matter, the Court must determine the correct subsection of *Rule 62* to apply to plaintiff's motion. In their submissions to the Court, the parties address plaintiff's motion as one made under *subsection (d) of Rule 62*. However, it is well-settled that *subsection (d)* applies exclusively to stays of money judgments, and permits the moving **[**6]** party to obtain a stay *as of right* upon the posting of a *supersedeas* bond. *See, e.g, Perez & CIA, Inc., v. United States, 747 F.2d 813, 816 (1st Cir. 1984)* (Breyer, J.) (observing that *Rule 62(d)* "is likely aimed at money judgments, the value of which can be calculated and secured with relative ease") (internal citation omitted); *In re Tower Automotive, Inc., No. 06-CV-2105 (RWS), 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at * 1-2 (S.D.N.Y. July 6, 2007)* (finding that "*Rule 62(d)* is inapplicable" where "the [c]ourt's [o]pinion was not a money judgment, but rather a declaratory judgment which determined the scope of [a party's monetary] obligation"); *see also Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir. 1992)* (granting a *Rule 62(d)* stay only where the declaratory judgment required payment of "a specific sum of money"); *Government Guar. Fund of Fin. v. Hyatt Corp., 167 F.R.D. 399, 400, 34 V.I. 274 (D.V.I. 1996)* ("Although the issue appears not to have arisen very often, those courts to address it have limited the applicability of *Rule 62(d)* to appeals from

money judgments or their equivalent.") (internal citations omitted).

Accordingly, the Court finds that *subsection (c)*, rather than *subsection (d)*, of **[*189]** *Rule 62* should **[**7]** apply in this case. *Rule 62(c)* provides, in pertinent part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.
>
> *Fed. R. Civ. P. 62(c).*

In the instant case, it is clear that plaintiff's motion should be analyzed under *subsection (c)* because the *vacatur* effectively "lift[ed] . . . an injunction" which provided for the attachment of defendants' assets, *see Fed. R. Civ. P. 62(c)*, and ordered plaintiff "to do" an affirmative act -- namely, to return the surety bond to defendant, *see Donovan v. Fall River Foundry Co., 696 F.2d 524, 526 (7th Cir. 1982)* ("The reference in *Rule 62(d)* to *supersedeas* bond suggests that had the framers thought about the point they would have limited the right to an automatic stay to cases where the judgment being appealed from was a 'money judgment.' . . . But this solution makes little sense as applied to an order to do, rather than an order to pay, whether or not the

order to [**8] do is a conventional injunction."). *See In re Tower Automotive, Inc., 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at *1-2*; *accord Perez & CIA., Inc., 747 F.2d at 816* (applying *subsection (c)* rather than *subsection (d)* to "[a] case in which a party seeks review of an agency's suspension order, . . . [because it] is more naturally viewed as a case involving an order to do, or not to do, something (that is, involving something like an injunction) rather than a case involving a money judgment") (internal citation omitted).

In any event, the Court notes that, although the parties specifically cite *subsection (d)* in their submissions, both characterize plaintiff's motion as an application for the Court to exercise its *discretion* to stay the *vacatur* pending appeal, and both present arguments relating to the factors for a discretionary stay under *Rule 62(c)*. (*See* Pl.'s Mem. at 3; Defs.' Mem. at 3.)

III. DISCUSSION

A. The Relevant Factors

> The factors relating to a discretionary stay under *Rule 62(c)* include:
>
> (1) Whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal;
>
> (2) The risk of irreparable injury to the movant absent a stay;
>
> (3) The lack of substantial harm [**9] to the non-movant if the stay is granted;

(4) The public interests that may be affected.

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (internal citations omitted); *Tower Automotive, 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at * 1-2*. In making such a determination, "[t]he Court treats these factors 'somewhat like a sliding scale.'" *United States v. VISA U.S.A., Inc., No. 98-CV-7076 (BSJ), 2007 U.S. Dist. LEXIS 58018, 2007 WL 2274866, at *1 (S.D.N.Y. Aug. 7, 2007)* (quoting *Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006)*). Thus, "'the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors.'" [4] *Id.* (quoting *Thapa, 460 F.3d at 334*) (additional internal quotation marks **[*190]** and citation omitted); *see also Hayes v. City Univ. of New York, 503 F. Supp. 946, 962 (S.D.N.Y. 1980)* ("Issuance of a stay pending appeal is discretionary and equitable . . .").

4 Defendant asserts that a movant's "'failure to satisfy one prong of the standard for granting a stay pending appeal dooms the motion.'" (Defs.' Br. at 3 (quoting *Covanta Onondaga Ltd. P'ship v. Onondaga County Resource Recovery Agency, No. 02-CV-492, 2002 U.S. Dist. LEXIS 20298, 2002 WL 31399797, at *2 (N.D.N.Y. Oct. 24, 2002)).*) The Court **[**10]** notes that its review of relevant authority regarding the above-cited standard does *not* indicate that the movant's failure to satisfy one factor "dooms the motion." (*Id.*) Rather, as noted *supra*, it is well-settled that the above-cited factors are treated

as a "sliding scale," wherein "'more of one excuses less of the other.'" *Thapa, 460 F.3d at 334* (citing *Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002)).* In addition, the single district court case cited by defendant in support of this proposition, *Covanta Onondaga,* appears to have derived the "failure as to one, failure as to all" rule from a line of decisions addressing applications for stays under the Bankruptcy Rules. *See Covanta Onondaga, 2002 U.S. Dist. LEXIS 20298, 2002 WL 31399797, at *2* (citing *Green Point Bank v. Treston, 188 B.R. 9,12 (S.D.N.Y. 1995)* (denying an application for a stay of a bankruptcy court order under *Bankruptcy Rule 8005*)). As such, the Court declines to apply the rule advanced by defendants, and, instead, adopts the "sliding scale" approach employed by the Court of Appeals for the Second Circuit and the overwhelming majority of district courts in this Circuit.

For the following reasons, the Court concludes, upon examination of these **[**11]** factors, that plaintiff's motion to stay the *vacatur* pending appeal should be denied.

1. Substantial Possibility of Success On Appeal

Plaintiff asserts that the *vacatur* was wrongly decided, and, more specifically, that there is a substantial possibility that the Court of Appeals will adopt plaintiff's position on the issue of whether defendant WBC KS can be "found" within the District for the purposes of *Rule B.* [5] Defendants respond that plaintiff has merely reiterated arguments that were previously rejected by this

Court in the *vacatur* decision, and that the authorities relied on by the Court in that decision indicate that there is not a substantial possibility that plaintiff's position will prevail on appeal.

> 5 As discussed in the *vacatur* decision, *Rule B* provides that, for an order of attachment to issue, the plaintiff must establish that the defendant cannot be "found within the district." Rule B(1)(a). The Second Circuit has held that this requirement presents "a two-pronged inquiry: First, whether (the respondent) can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process." *Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 582 (2d Cir.1963)* **[**12]** (internal quotation marks and citations omitted). The Court notes that plaintiff has conceded that the second prong of the *Seawind* test has been satisfied in this action. Specifically, it is undisputed that WBC KS has a designated agent for service of process in this District. However, the parties have vigorously disputed whether defendant was present for jurisdictional purposes within the District at the time of attachment. In the *vacatur* decision, the Court found that defendant was present for jurisdictional purposes.

The "key inquiry" with regard to the jurisdictional presence issue is "whether the defendant is amenable to suit within the district." [6] (*See* Tr. of *Vacatur Decision*, **[*191]** at 7.) Upon consideration of defendant's motion to vacate the attachment order, the Court conducted such an inquiry and concluded

that WBC KS has unambiguously made itself amenable to suit within the District. (*See id.* at 3-8.) With regard to the instant motion, the Court adheres to its prior determination on this issue, and further finds, for the following reasons, that plaintiff's position -- namely, that defendant's amenability to suit in the District is insufficient, by itself, to establish defendant's **[**13]** presence here -- does not present a "substantial" possibility of success on appeal.

> 6 As a threshold matter, the Court notes that there is a split of authority among district courts in this circuit as to the central issue in this action -- namely, whether defendant's registration in New York State as a foreign corporation and its consent to this Court's jurisdiction, taken together, are sufficient to establish under Rule B that defendant can be "found" for jurisdictional purposes within the District. *Compare Express Sea Transport Corp., v. Novel Commodities S.A.*, No. 06-CV-2404 (GEL) (Tr. of Oral Decision issued on May 4, 2006) (S.D.N.Y. 2006) (finding that the defendant's registration as a foreign corporation in New York State and its consent to the court's jurisdiction were sufficient to establish that it "can be found within the district for the purposes of jurisdiction"), *with Erne Shipping Inc. v. HBC Hamburg Bulk Carriers GmbH & Co. KG, 409 F. Supp. 2d 427, 438 (S.D.N.Y. 2006)* ("[W]e do not consider such filing to be sufficient to make a showing that a defendant is 'found' within the district."). Nevertheless, notwithstanding the divergent authority on this

issue, the Court finds, [**14] for the reasons set forth herein and for the reasons stated on the record in the *vacatur* decision, that plaintiff has failed to establish a possibility of success on appeal.

In evaluating the jurisdictional presence factor under *Rule B*, the Second Circuit and the majority of district courts in this Circuit have focused principally upon that party's amenability to suit rather than the party's economic and physical activities in the district at issue. In *Integrated Container, Inc. v. Starlines Container Shipping, Ltd., 476 F. Supp. 119, 123 (S.D.N.Y. 1979)*, Judge Leval, sitting on the district court, held that the defendant could be "found" within the district for jurisdictional purposes based on, *inter alia*, the defendant's registration as a licensed foreign corporation within New York State and an agreement in which the defendant expressly consented to "the jurisdiction of the courts of New York." [7] More recently, the Second Circuit declined to discuss specifically the presence factor, but, instead, cited *Integrated Container* for the proposition that district courts have not "experienced any confusion in its application." *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 n.4 (2d Cir. 2006)*. [**15] Indeed, the court in *Aqua Stoli* specifically characterized the district court's opinion in *Integrated Container* as "explaining the [presence] requirement." *Aqua Stoli, 460 F.3d at 445 n.4*.

7 The court in *Integrated Container* also relied on the fact that the defendant had entered into a third agreement which "called for submission to arbitration in New York with New York law to apply." *476 F. Supp. at 123*. In addition, the

> Court notes that, ultimately, the *Integrated Container* court declined to vacate the maritime attachment in that case because the defendant did not satisfy the service of process prong of the *Seawind test*. By contrast, in the instant case, as noted *supra*, it is undisputed that WBC KS has satisfied the service of process prong of the *Seawind* test.

Plaintiff argues that the court in *Integrated Container* specifically rejected the "notion . . . that an agent in the district over whom personal jurisdiction could be gained . . . was alone sufficient to meet the jurisdictional presence prong under Rule B." (Pl.'s Mem. at 7.) Instead, according to plaintiff, the court in *Integrated Container* "required something more than the mere presence of an agent in the district" for the **[**16]** purposes of the jurisdictional presence factor. (*Id.*) However, plaintiff offers an overly narrow view of the scope of the court's holding in *Integrated Container* regarding the jurisdictional presence factor. Rather, in *Integrated Container*, the court held that the jurisdictional presence factor is satisfied either where the defendant's "activity in the district" or its "contacts with the district . . . permit the court to exercise *in personam* jurisdiction over the defendant." *476 F. Supp. at 122*. Applying this standard, the court found that the defendant's registration as a foreign corporation in New York State and its consent via contract to the court's jurisdiction and to arbitration within New York State were sufficient to establish the defendant's jurisdictional presence in the district at issue. *See id. at 123*.

Similarly, in this case, it is undisputed that, as noted *supra*, WBC KS is a registered foreign corporation within the State of New York and, as such, under well-settled principles of New York State law, WBC KS has consented to general jurisdiction in the courts of the state, and, **[*192]** consequently, in this Court. *See Speed v. Pelican Resort N.V. No. 91-CV-7686 (SWK), 1992 U.S. Dist. LEXIS 8278, 1992 WL 147646, at *1 (S.D.N.Y. June 16, 1992)* **[**17]** (finding, with regard to a Netherlands Antilles corporation, that "it is clear that 'if a foreign corporation is authorized to do business in this state, a court is justified in inferring that it is doing business so that it is subject to jurisdiction of the courts.") (quoting 14 N.Y. Jur. 2d, Business Relationships § 522 (1981)); *accord Iyalla v. TRT Holdings, Inc., No. 04-CV-8114 (NRB), 2005 U.S. Dist. LEXIS 14913, 2005 WL 1765707, at *3 (S.D.N.Y. July 25, 2005)* ("[A]ny corporation registered to do business within the state is subject to personal jurisdiction in the state."); *Obabueki v. IBM, Nos. 99-CV-11262, 99-CV-12486 (AGS), 2001 U.S. Dist. LEXIS 11810, 2001 WL 921172, at *5 (S.D.N.Y. Aug. 14, 2001).* Furthermore, it is beyond doubt that WBC KS has specifically consented, on the record, to the jurisdiction of this Court for the purposes of any and all proceedings relating to this action. [8] Accordingly, based on the close similarity of the facts relating to the presence issue in this case with those found in *Integrated Container*, the fact that the Second Circuit has recently cited with approval the analysis of that issue by the district court in *Integrated Container*, and, as set forth in the *vacatur* decision, this Court's prior determination **[**18]** that the controlling factor with regard to

jurisdictional presence is the defendant's amenability to suit in the District, the Court finds that plaintiff's position does not present a substantial possibility of success on appeal.

> 8 Defendant's counsel stated such consent in two appearances before the Court: during argument regarding the *vacatur* and, once again, during argument regarding the instant motion to stay. (*See* Tr. of *Vacatur* Decision, at 7; Tr. of Proceedings on Sept. 28, 2007, at 12.)

2. The Risk of Irreparable Injury to Plaintiff

Plaintiff asserts that, absent a stay of the *vacatur*, there is a significant risk of irreparable injury to plaintiff. Specifically, plaintiff asserts that, absent a stay of the *vacatur*, WBC KS may withdraw its registration as a licensed foreign corporation in New York State, thus preventing this Court and/or the Court of Appeals from exercising jurisdiction over WBC KS. In addition, plaintiff argues that, if WBC KS is permitted to remove the surety bond, WBC KS may subsequently experience a financial downturn which may, in the absence of the surety bond, frustrate plaintiff's efforts to collect on any future money judgment obtained by plaintiff against **[**19]** defendant. The Court rejects both of plaintiff's arguments and, instead, finds that, absent a stay, there is little risk that plaintiff will suffer irreparable injury that cannot be compensated by money damages.

a. Loss of Jurisdiction Over Defendant

The Court rejects plaintiff's assertion that defendant's de-registration as a licensed foreign

corporation in New York would somehow prevent this Court and/or the Court of Appeals from exercising jurisdiction over defendant. As an initial matter, the Court notes that plaintiff has failed to offer any evidence that defendant intends to de-register, and defendant vigorously asserts its intention to maintain its current registration status. However, even assuming *arguendo* that defendant is likely to de-register and, subsequently, remove its assets from the District, it is beyond doubt that this Court and the Court of Appeals would retain jurisdiction over this action.

In *Republic National Bank of Miami v. United States, 506 U.S. 80, 87-88, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992)*, the Supreme Court, applying admiralty principles to a civil forfeiture proceeding, [9] found **[*193]** that, while a district court must have jurisdiction over a *res* to *initiate* an *in rem* action, it need not maintain **[**20]** continuous control of the *res* to *maintain* jurisdiction of the action. The Court observed:

> Stasis is not a general prerequisite to the maintenance of jurisdiction. Jurisdiction over the person survives a change in circumstances, *Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 454, 52 S. Ct. 238, 76 L. Ed. 389, 1932 Dec. Comm'r Pat. 564 (1932)* ("[A]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause," citing *Nations v. Johnson, 65 U.S.C. (24 How.) 195, 16 L. Ed. 628*

(1861)), as does jurisdiction over the subject matter, *Louisville, N.A. & C.R. Co. v. Louisville Trust Co., 174 U.S. 552, 566, 19 S. Ct. 817, 43 L. Ed. 1081 (1899)* (midsuit change in the citizenship of a party does not destroy diversity jurisdiction); *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (jurisdiction survives reduction of amount in controversy). Nothing in the nature of *in rem* jurisdiction suggests a reason to treat it differently.

Republic Nat'l Bank, 506 U.S. at 87-88.

9 *28 U.S.C. § 2461(b)* directs federal courts to conduct civil forfeiture proceedings in a manner "as near as may be to proceedings in admiralty."

In the context of maritime attachments, at least one **[**21]** circuit has, not surprisingly, read the holding in *Republic National Bank* to "eliminate any requirement on a party seeking to institute a maritime attachment to obtain a stay or post a *supersedeas* bond to preserve the district court's jurisdiction over the garnished funds while [that party] appealed the release of the garnished funds." *Stevedoring Servs. of Am. v. Ancora Transp., N.V., 59 F.3d 879, 882 (9th Cir. 1995)* ("We conclude that the district court's release of the garnished funds . . . did not divest the court of jurisdiction over the *res.*") [10]; *see also Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852, 860, 861 (9th Cir. 2005)* ("In

short, *in rem* or *quasi in rem* jurisdiction remains throughout the course of an appeal, as long as jurisdiction was properly obtained at the initiation of the action. Otherwise, the prevailing party could frustrate the losing party's appeal by transferring the *res* out of the district court's jurisdiction, a practice to which [t]he Supreme Court objected in no uncertain terms in *Republic National Bank*.") (internal quotation marks and citation omitted).

> 10 The court in *Stevedoring Services* rejected as immaterial the lone fact that could have **[**22]** served to undermine the application of the *Republic National Bank* holding in the context of maritime attachments; specifically, the court refused to distinguish the Supreme Court's holding based upon the fact that the forfeiture action at issue in *Republic National Bank* was an *in rem* proceeding and that maritime attachments are *quasi in-rem* proceedings. *See Stevedoring Servs., 59 F.3d at 882-83* ("[T]his difference suggests no reason why we should distinguish the Supreme Court's decision in [*Republic National Bank*].").

Here, the Court adopts the sound reasoning of the Ninth Circuit in *Stevedoring Services* in applying the holding of *Republic National Bank* to the maritime attachment context, and, as such, concludes that defendant's de-registration, and the subsequent removal of defendant's assets from the District, will not divest this Court or the Court of Appeals of jurisdiction over defendant. Accordingly, the Court rejects the alleged injury regarding the loss of jurisdiction over defendant as a basis for a stay.

b. Plaintiff's Inability to Enforce Money Judgments Against Defendant

Plaintiff also asserts that "the loss of the surety bond [posted by defendant] in this **[*194]** matter would be **[**23]** an irreparable injury, since there is a reasonable chance that [defendant] may not be able to satisfy" future money judgments obtained by plaintiff against defendant. (Pl.'s Mem. at 14.) The Court rejects this alleged injury as a basis for a stay pending appeal. Instead, the Court finds that the monetary injury alleged by plaintiff is not the type of injury that may justify a stay of the *vacatur* pending appeal.

"As a general matter, because monetary injury can be estimated and compensated, the likelihood of such injury usually does not constitute irreparable harm." *Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999)* (citing *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)* (per curiam); *see also Ford v. Reynolds, 316 F.3d 351, 355 (2d Cir. 2003)* ("To establish irreparable harm, the injury alleged 'must be one requiring a remedy of more than mere money damages.") (quoting *Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)*); *E.E.O.C. v. Local 638, No. 71-CV-2877 (RLC), 1995 U.S. Dist. LEXIS 7756, 1995 WL 355589, at *2 (S.D.N.Y. June 7, 1995)* ("Irreparable injury means 'the kind of injury for which money cannot compensate,' and therefore **[**24]** '[a] monetary loss will not suffice unless the movant provides evidence of damage[] that cannot be rectified by financial compensation.'") (quoting *Sperry Int'l Trade, Inc. v. Gov't of Israel, 670 F.2d 8, 12 (2d Cir. 1982)*, and

Tucker Anthony Realty Corp., 888 F.2d at 975). However, "courts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents." *Brenntag Int'l Chems., Inc., 175 F.3d at 250* (collecting cases). Accordingly, monetary injury *may* suffice to establish irreparable harm in situations "where the party that might ultimately be ordered to pay the monetary damages is insolvent or facing imminent bankruptcy, or is in a perilous financial state." *Bridgeport, Port Jefferson Steamboat Co. v. Bridgeport Port Auth., No. Civ. A. 3:03-CV-599 (CFD), 2004 U.S. Dist. LEXIS 6643, 2004 WL 840140, at *3 (D. Conn. April 15, 2004)* (internal quotation marks and citations omitted); *accord Sea Carriers Corp. v. Empire Programs, Inc., No. 04-CV-7395 (RWS), 2006 U.S. Dist. LEXIS 83843, 2006 WL 3354139, at *4 (S.D.N.Y. Nov. 20, 2006)* ("Monetary loss therefore will not suffice unless the movant shows damage that cannot be rectified by financial compensation . . . . One such exception is where the party **[**25]** to be enjoined is shown to be insolvent or imminently insolvent."); *Mitsubishi Power Sys., Inc. v. Shaw Group, Inc., No. 04-CV-1251 (RMB), 2004 U.S. Dist. LEXIS 4125, 2004 WL 527047, at *2 (S.D.N.Y. March 16, 2004)* ("Courts have generally applied this limited exception where insolvency is imminent.").

Here, it is beyond doubt that the injuries alleged by plaintiff are *not* ones requiring a remedy of more than money damages: plaintiff specifically seeks to ensure that it will be able to collect on money judgments against WBC KS.

Furthermore, plaintiff has failed to establish that any judgment against defendant WBC KS would

otherwise be uncollectible. Plaintiff has not asserted that WBC KS is currently insolvent, and the Court rejects as mere speculation plaintiff's assertions regarding the perilous financial condition of WBC KS. Indeed, although plaintiff has shown that WBC KS has experienced some financial losses within the past four years, it is clear that WBC KS retains sizable assets and, as of August 31, 2007, had generated pre-tax profits of $ 20.4 million during the current financial year. (Vangsnes Decl. PP 11, 15.) As such, WBC KS does not appear to be experiencing the financial distress that other courts **[**26]** have required before applying the "imminent insolvency" exception to the monetary injury rule. *See, e.g., Mitsubishi Power Sys., 2004 U.S. Dist. LEXIS 4125, 2004 WL 527047, at *4* **[*195]** (citing, *inter alia*, the following cases: *Meringolo v. Power2Ship, No. 03-CV-4476 (PKL), 2003 U.S. Dist. LEXIS 12997, 2003 WL 21750009, at *3-5 (S.D.N.Y. July 28, 2003)* (denying preliminary injunction and declining to apply the imminent insolvency exception even though the defendant company had "generated almost no revenue from its inception [and] has never earned a profit since its formation," and its "independent auditors have qualified the company's financial statements as a 'going concern.'"); *General Transp. Servs. Inc. v. Kemper Ins. Co., No. 5:03-CV-620, 2003 U.S. Dist. LEXIS 12630, 2003 WL 21703635, at *3-4 (N.D.N.Y. June 25, 2003)* (denying a preliminary injunction and finding that "although Plaintiff arguably raises questions about [the defendant's] present financial condition, its assertions fall far short of establishing that [the defendant] is in 'imminent' danger of becoming insolvent," even where the defendant's credit rating had been

downgraded to "C++" and the defendant had defaulted on $ 700 million of its notes and laid off 1,000 of its 7,000 employees)). Accordingly, the **[**27]** Court finds that plaintiff has fallen short of establishing WBC KS' imminent insolvency so as to establish a risk of irreparable injury. Therefore, because "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm," *Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)*, the Court rejects plaintiff's alleged monetary injury as a basis for a stay of the *vacatur* pending appeal. [11]

11 Plaintiff also cites to *Swift Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 689, 70 S. Ct. 861, 94 L. Ed. 1206 (1950)*, in support of its argument regarding irreparable harm. Specifically, plaintiff cites *Swift* for the proposition that "[a]ppellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." *Id. at 689*. The Court finds that *Swift*, and the quotation therefrom, are not relevant to the irreparable harm inquiry in the instant, case. *Swift* addressed the issue of whether "the order vacating the attachment was not a final order and therefore not reviewable" by the appellate court. *Id. at 688*. **[**28]** By contrast, the issue here is whether equity favors a stay of the *vacatur* pending appeal. Furthermore, the circumstances of *Swift* -- involving the attachment of a vessel -- contrast significantly

with those of the instant case, wherein the *vacatur* relates exclusively to the release of security posted by defendants. Thus, as discussed herein, the Court finds that the concern enunciated in *Swift* is absent from the instant case -- there is no significant risk that plaintiff's appeal will prove an "empty rite," at least where plaintiff does not seek to attach a vessel and the Court may direct defendant to post security following an appeal, if necessary.

3. Substantial Harm to Defendant

Defendant asserts that, if a stay is entered, it will suffer substantial harm in the form of the continued cost of maintaining the surety bond during the pendency of an appeal, and the consequent loss of "the use of a percentage of its credit facility." (Defs.' Mem. at 9-10.) In response, plaintiff asserts that a stay will not result in substantial harm to defendant because plaintiff is prepared to post a bond to cover the cost of maintaining the surety bond during the appeal. (Pl.'s Mem. at 14-15.) The Court **[**29]** finds that this factor weighs in favor of granting a stay. Thus, assuming *arguendo* that plaintiff could post a sufficient bond to satisfy the Court, any financial harm suffered by defendant is unlikely to be substantial.

4. The Public Interest

Plaintiff asserts that the public's interest in ensuring the enforcement of foreign judgments -- such as the judgment plaintiff expects to obtain against defendant in the courts of Angola -- favors a stay of the *vacatur* pending appeal. The Court rejects this argument. Initially, the Court notes that

plaintiff fails to cite any authority **[*196]** in support of the alleged public interest. In addition, it is beyond doubt that plaintiff has yet to obtain a judgment against defendant in the Angolan action. As such, the Court finds that plaintiff presents mere speculation as to the presence of a public interest favoring a stay of the *vacatur* and, thus, could reject plaintiff's argument on that basis alone.

However, even assuming *arguendo* that there is a public interest in the enforcement of foreign judgments *and* that plaintiff will eventually obtain such a judgment, plaintiff has failed, as discussed *supra*, to establish that it will be unable to collect on any future judgments obtained against WBC KS in this action. Therefore, there is no basis for this Court to find that such an interest would be adversely effected by denying a stay of the *vacatur*.

B. Weighing the Factors

On balance, the above-cited factors weigh against granting a stay of the *vacatur* pending appeal. Although the factor concerning substantial harm to defendant slightly favors a stay, the remaining factors weigh heavily against a stay of the *vacatur*. First, the factor regarding plaintiff's possibility of success on appeal weighs against a stay; that is, plaintiff's possibility of success on appeal, although not insignificant, does not appear to be "substantial." Second, most significantly, the factor concerning irreparable injury overwhelmingly weighs against a stay of the *vacatur*; as discussed *supra*, plaintiff has failed to establish any legally cognizable type of irreparable injury sufficient to justify a stay pending

appeal. Finally, plaintiff has failed to establish any public interest favoring a stay.

C. Plaintiff's Request for a Temporary Stay

The Court grants plaintiff's request for a temporary stay of the *vacatur* so that plaintiff may apply to the Court of Appeals for the Second Circuit for a stay pending appeal, pursuant to *Rule 8(a) of the Federal Rules of Appellate Procedure. See, e.g., In re Albicocco, No. 06-CV-3409 (JFB), 2006 U.S. Dist. LEXIS 65359, 2006 WL 2620464, at *5 (E.D.N.Y. Sept. 13, 2006)* (denying a stay pending appeal under *Rule 62*, but granting a temporary stay so that a party could apply to the Court of Appeals for a stay); *Motorola Credit Corp. v. Uzan, 275 F. Supp. 2d 519, 525 (S.D.N.Y. 2003)* (same); **[**30]** *Paris v. (1) Dep't of Nat'l Store Branch (1) Vietnam, No. 99-CV-8607 (NRB), 2000 U.S. Dist. LEXIS 8331, 2000 WL 777904, at *5 (S.D.N.Y. June 15, 2000)* (same); *LNC Investments, Inc. v. Republic of Nicaragua, No. 96-CV-6360 (JFK) 2000 U.S. Dist. LEXIS 7738, 2000 WL 729216, at *2 (S.D.N.Y. June 6, 2000)* (same). If plaintiff fails to apply to the Court of Appeals by Friday, October 19, 2007, the temporary stay shall expire. However, if plaintiff applies for a stay pending appeal with the Court of Appeals before that deadline, this Court's temporary stay will remain in effect until the stay motion before the Second Circuit is decided.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for a stay of the *vacatur* pending appeal is DENIED. Plaintiff's request for a temporary stay of the *vacatur*

pending the Court of Appeals' resolution of a motion to stay is GRANTED.

SO ORDERED.

RICHARD J. SULLIVAN

United States District Judge

Dated: October 12, 2007

New York, NY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of July, two thousand and nine,

---

Centauri Shipping Ltd.,

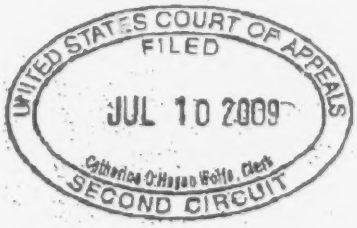
Plaintiff-Appellant,

v.

Western Bulk Carriers KS,
Western Bulk AS,
Western Bulk Carriers AS,

Defendants-Appellees.

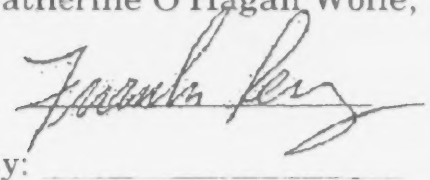
ORDER
Docket Number:
07-4193-cv



Appellant, Centauri Shipping Ltd., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk



By: _____
Frank Perez, Deputy Clerk

LEXSTAT FED. R. SUPP. ADM. MARITIME CLAIMS B

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*** CURRENT THROUGH CHANGES RECEIVED AUGUST 18, 2009 ***

SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Go to the United States Code Service Archive Directory

USCS Admiralty and Maritime Claims R B

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule B. In Personam Actions: Attachment and Garnishment [Caution: For amendments effective December 1, 2009, see prospective amendment note to this rule.]

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action

brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof--which may be by affidavit--that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

(3) Answer.

(a) *By Garnishee.* The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be

held in either case subject to the further order of the court.

(b) *By Defendant.* The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

LEXSTAT NY CLS BUS CORP § 1304

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*** THROUGH RELEASED CH. 1 THROUGH 14, 16 THROUGH 49, 52, AND 56 THROUGH 68 ***

BUSINESS CORPORATION LAW
ARTICLE 13. FOREIGN CORPORATIONS

Go to the New York Code Archive Directory

NY CLS Bus Corp § 1304 (2009)

§ 1304. Application for authority; contents

(a) A foreign corporation may apply for authority to do business in this state. An application, entitled "Application for authority of . . .. (name of corporation) under *section 1304 of the Business Corporation Law*", shall be signed and [fig 1] delivered to the department of state. It shall set forth:

(1) The name of the foreign corporation.

(2) The fictitious name the corporation agrees to use in this state pursuant to section 1301 of this chapter, if applicable.

(3) The jurisdiction and date of its incorporation.

(4) [fig 1] The purpose or purposes for which it is formed, it being sufficient to state, either alone or with other purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under this chapter, provided that it also state that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained. By such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations therein or in this chapter, if any.

(5) The [fig 1] county within this state in which its office is to be located.

(6) A designation of the secretary of state as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him.

(7) If it is to have a registered agent, his name and address within this state and a statement that the registered agent is to be its agent upon whom process against it may be served.

(8) A statement that the foreign corporation has not since its incorporation or since the date its authority to do business in this state was last surrendered, engaged in any activity in this state, except as set forth in paragraph (b) of section 1301 (Authorization of foreign corporations), or in lieu thereof the consent of the state tax commission to the

filing of the application, which consent shall be attached thereto.

(h) Attached to the application for authority shall be a certificate by an authorized officer of the jurisdiction of its incorporation that the foreign corporation is an existing corporation. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

LEXSTAT N.Y. C.P.L.R. 301

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CIVIL PRACTICE LAW AND RULES
ARTICLE 3. JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

Go to the New York Code Archive Directory

NY CLS CPLR § 301 (2009)

§ 301. Jurisdiction over persons, property or status

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.